

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-221891; B-221892 **DATE:** May 7, 1986

MATTER OF: Asbestos Abatement of America, Inc.

DIGEST:

1. Although an agency may have initially erred by issuing a total small business set-aside solicitation for a particular scope of work that was already contained in an unrestricted solicitation for a much larger effort, a compelling reason exists to cancel the set-aside where the remaining low, responsive small business bid, on its face, is 137 percent higher than the combined item price for the equivalent work submitted by the large business awardee under the unrestricted solicitation and is 153 percent higher than the rejected low bid under the set-aside.
2. Where the proposed cancellation of a solicitation is found to be proper, and in the absence of any showing of bad faith on the agency's part in originally issuing the solicitation, the protester's bid preparation costs and its costs of filing and pursuing the protest, including attorney's fees, are not recoverable.

Asbestos Abatement of America, Inc. (AAAI) protests the proposed post-bid opening cancellation of invitation for bids (IFB) No. 263-86-B(90)-0010, issued as a total small business set-aside by the Department of Health & Human Services (HHS) for the removal of asbestos and chemical residue from Building No. 4 at the National Institutes of Health. AAAI alleges that no compelling reason exists for the cancellation and contends that it is entitled to an award under the set-aside as the remaining low, responsive small business bidder. Alternatively, AAAI seeks recovery of its bid preparation costs and its costs of filing and pursuing the protest, including attorney's fees. We deny the protest and the claim for costs.

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(1) Propriety of Cancellation

Background

On October 23, 1985, HHS issued an unrestricted solicitation (IFB No. 263-86-B(93)-0003) for the complete renovation of Building No. 4 at the National Institutes of Health. A certain portion of the contemplated work was for the removal of asbestos and chemical residue. Shortly thereafter, HHS issued a second solicitation (IFB No. 263-86-B(90)-0010) as a total small business set-aside only for the asbestos and chemical residue removal work at Building No. 4.

Bids under both solicitations were opened on January 8, 1986. Eight bids were received for the larger project, ranging from \$11,080,000 to \$14,890,300. Combined item prices in those bids for the asbestos and chemical residue removal work alone ranged from \$250,000 to \$988,000. A.S. McGaughan Company was the low bidder for the complete renovation work and also submitted the low combined item price for asbestos and chemical residue removal.

Seven bids were received under the set-aside solicitation, ranging from \$233,474 to \$995,384. Although Desco Insulation Company submitted the low bid, the bid was rejected because Desco had certified that it was a large business and, therefore, not eligible for an award under the set-aside. The next low bidder was AAAI with a bid of \$592,900.

Because A.S. McGaughan's bid for the complete renovation effort included a combined item price for asbestos and chemical residue removal that was much lower than AAAI's remaining low bid for the same work under the set-aside, HHS determined that it was in the government's best interest to award A.S. McGaughan a contract under the unrestricted solicitation and to cancel the set-aside.

AAAI alleges that HHS has no compelling reason to cancel the set-aside after the exposure of bids. Accordingly, the firm urges that it is entitled to an award under the set-aside as the remaining low, responsive small business bidder. AAAI notes that its price of \$592,900 is well within the government's estimate of \$500,000 to \$1,000,000 for the asbestos and chemical residue removal work as stated in the set-aside solicitation. Moreover, AAAI contends that it is improper for HHS to compare its bid price with A.S. McGaughan's combined item price for asbestos and chemical residue removal under the larger procurement.

In this regard, AAAI asserts that the scope of work under the set-aside included that demolition work necessary to effect the removal of asbestos and chemical residue, whereas demolition was priced separately under the larger procurement. Therefore, AAAI urges that A.S. McGaughan's price of \$250,000 cannot be fairly compared with its own price of \$592,900 because the former does not include any demolition work.

In response to the protest, HHS has acknowledged that it possibly erred in issuing two solicitations which overlapped in terms of the scope of work, although HHS nonetheless states that it believed legitimate business reasons for its action existed at the time.^{1/} HHS concedes that the set-aside solicitation should have given notice to small business bidders that a larger unrestricted procurement existed which also contemplated the same asbestos and chemical residue removal work, and, accordingly, that an award might not be made under the set-aside.

In any event, however, HHS believes that the proper course of action is now to cancel the set-aside because the asbestos and chemical residue removal work can be performed at a much lower price by A.S. McGaughan as part of its contract for the full renovation of Building No. 4. Additionally, HHS asserts that AAAI no longer remains an interested party to pursue the protest because Desco, whose low bid was originally rejected because the firm had certified its status as a large business, has now advised HHS that it mistakenly furnished that certification and has submitted evidence to establish its status as a small business concern. Thus, HHS contends that the protest should be dismissed because, even if this Office should conclude that the proposed cancellation is improper and recommend that an award be made under the set-aside, Desco, and not AAAI, is in line to receive that award.

Analysis

The Federal Acquisition Regulation (FAR), § 14.404-1 (a)(1) (FAC 84-5, Apr. 1, 1985), provides that, in order to preserve the integrity of the competitive bidding system

^{1/} HHS' stated reasons are: (1) the agency had previous difficulty in obtaining fair and reasonable prices for work involving asbestos removal; and (2) the agency did not want to risk losing a competent contractor for the complete renovation effort because of the firm's inability to provide asbestos removal services.

after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid unless there is a compelling reason to reject all bids and cancel the invitation. Such a compelling reason exists, however, where all otherwise acceptable bids are at unreasonable prices. FAR, § 14.404-1(c)(6). Determinations of price unreasonableness involve broad discretion on the part of contracting officials and properly may be based upon comparisons with such things as a government estimate, past procurement history, current market conditions, or any other relevant factors. Mid South Industries, Inc., B-216281, Feb. 11, 1985, 85-1 CPD ¶ 175.

Thus, we have upheld cancellations of total small business set-asides where the low small business bids were, respectively, 28 percent and 17 percent greater than bids submitted by large businesses on prior procurements. Custom Marine, Inc., B-200126, Feb. 19, 1981, 81-1 CPD ¶ 111; North American Signal Co., B-190972, May 19, 1978, 78-1 CPD ¶ 387. These decisions reflect the well-settled rule that an award may be made on a small business set-aside at a price above that obtainable on the open market from large business firms, but that an unreasonable price may not be paid. Society Brand, Inc. et al., 55 Comp. Gen. 475 (1975), 75-2 CPD ¶ 327.

We also have upheld the cancellation of an IFB on the ground of price unreasonableness where the remaining low, responsive bid, although within the government estimate (albeit an estimate considered to be unreliable), was 36 percent higher than the nonresponsive low bid (defective bid bond). Hercules Demolition Corp., B-186411, Aug. 18, 1976, 76-2 CPD ¶ 173; see also Colonial Ford Truck Sales, Inc., B-179926, Feb. 19, 1974, 74-1 CPD ¶ 80 (cancellation upheld where the remaining low, responsive bid was 13 percent higher than the nonresponsive low bid (bid unsigned)). Our rationale, as first stated in 36 Comp. Gen. 364 (1956), is that:

" . . . We cannot . . . consider the matter of competitive bidding for Government contracts solely as a game, in which the contract must automatically go to the lowest bidder without regard to the reasonableness of his price or to other attempted bids which cannot for technical reasons be accepted. When in light of all the facts, including those disclosed by the bidding, it is administratively determined that the lowest acceptable bid is in excess of the amount for

which the Government should be able to obtain the supplies or services sought, we believe that the rejection of all bids and readvertising of the contract is a proper exercise of the administrative discretion, in conformity with the duty of the administrative officials to act in the best interest of the Government. . . ." (Emphasis supplied.)

We think that our prior precedent in these matters necessitates a conclusion that HHS has a compelling reason to reject AAAI's bid and cancel the set-aside in issue here. (Of course, an attendant resolicitation is not appropriate because the work will be performed as part of the complete renovation contract.) A.S. McGaughan's combined item price for asbestos and chemical residue removal in its bid for the complete renovation project represents, in essence, a prior large business bid which legitimately may be used for purposes of determining the price reasonableness of small business bids. Custom Marine, Inc., B-200126, supra. The firm's bid is also directly analogous to a "courtesy" bid from a large business concern ineligible for award under a set-aside that is used in making a price comparison. See Saratoga Industries--Reconsideration, B-202698.2, Jan. 22, 1982, 82-1 CPD ¶ 47. Since AAAI's bid for asbestos and chemical residue removal, on its face, is 137 percent higher than A.S. McGaughan's combined item price for equivalent work, we believe such a comparison clearly supports a determination that AAAI's price is unreasonable.

Even accepting AAAI's argument that A.S. McGaughan's combined item price does not include any demolition work necessary to effect the removal of asbestos and chemical residue, we cannot find from our examination of the record that the addition of demolition costs to its combined item price of \$250,000 would so increase that price that AAAI's bid of \$592,900 would become reasonable in comparison. We note in this regard that the IFB for the larger procurement asked for a separate item price for demolition, which A.S. McGaughan priced at \$750,000, but that this encompassed all demolition^{2/} required for the complete renovation of Building No. 4. Since asbestos and chemical residue removal was only a minor part of the entire building renovation effort, we believe it is unreasonable to assume that a

^{2/} As stated in the solicitation for the larger procurement, "demolition" included, among other things, the removal of all interior partitions, casework, benchtops, shelving, existing wood windows, mechanical and electrical work, trees, shrubs and planting, as well as the removal of asbestos materials and chemical residue.

substantial portion of A.S. McGaughan's demolition item price of \$750,000 should be reallocated to its price for asbestos and chemical residue removal in an effort to reflect what amount A.S. McGaughan might have bid for the work as specifically called for in the set-aside solicitation. Therefore, we cannot say that it is improper to compare AAAI's small business bid with A.S. McGaughan's combined item price in its large business bid to determine that AAAI's price is unreasonable. See Messinger Bearings Corp., B-219724, Oct. 23, 1985, 85-2 CPD ¶ 448.

We also note that AAAI's bid is 153 percent higher than the bid submitted by Desco, and this fact provides additional support for HHS' proposed cancellation. It is immaterial that Desco's bid was rejected due to the firm's self-certification as a large business^{3/}, since, as already indicated, an unacceptable bid is generally relevant to the determination of what is a reasonable price. Hercules Demolition Corp., B-186411, supra. Thus, in Support Contractors, Inc., B-181607, Mar. 18, 1975, 75-1 CPD ¶ 160, the rejected low bid under a set-aside (the bidder did not qualify as a small business) was properly used by the agency in determining that the remaining low, responsive bid was unreasonable in price where it was 22.3 percent higher than the rejected bid. Although AAAI alleges that Desco's price must be mistaken in view of the government's estimate^{4/} as

^{3/} We have not considered HHS' argument that AAAI is no longer an interested party to pursue the protest on the basis of Desco's present asserted status as a small business concern principally because the Small Business Administration has yet to determine conclusively Desco's actual status. See Jimmy's Appliance, 61 Comp. Gen. 444 (1982), 82-1 CPD ¶ 542.

^{4/} We note that HHS's estimated price range of \$500,000 to \$1,000,000 reflected three estimates prepared by agency consultants. AAAI challenges the validity of two of those estimates with regard to the degree in which they properly considered the entire scope of asbestos and chemical residue removal work and attendant demolition costs, essentially claiming they should be higher. However, AAAI does not apparently challenge the validity of the third and most recent consultant estimate, prepared less than a month before the set-aside was issued, which determined that the asbestos and chemical residue removal work, including (ft. nt. 4 cont'd on pg. 7).

stated in the set-aside solicitation, AAAI's allegation is mere speculation and will not be considered. We have consistently held that a protester's speculation that a competitor's price is mistaken does not provide a legal basis of protest because questions of mistake are solely for resolution by the agency and the affected party. Parker Shane Mfg., B-220273, Sept. 30, 1985, 85-2 CPD ¶ 367.

Accordingly, we believe that the proposed cancellation is proper in view of the wide difference between AAAI's bid price and the comparative prices of both A.S. McGaughan and Desco.

(2) Claim for Costs

We will allow a protester to recover its bid or proposal preparation costs only where (1) the protester had a substantial chance of receiving the award but was unreasonably excluded from the competition, and (2) the remedy recommended by this Office is not one delineated in our Bid Protest Regulations at 4 C.F.R. §§ 21.6(a)(2-5) (1985). EHE National Health Services, Inc., B-219361.2, Oct. 1, 1985, 65 Comp. Gen. ___, 85-2 CPD ¶ 362. As provided by section 21.6(e) of our Regulations, the recovery of the costs of filing and pursuing the protest, including attorney's fees, is limited to situations where the protester was unreasonably excluded from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. EHE National Health Services, Inc., *supra*.

Here, although AAAI incurred costs in preparing a bid in response to the set-aside solicitation^{5/} and in later

^{5/} We note, however, that AAII has never expressly alleged that it would not have prepared and submitted a bid if it had known that a contract might not be awarded under the set-aside because the same work was part of a larger procurement.

(ft. nt. 4 cont'd)

demolition, would cost \$506,500. AAAI's bid is 17 percent higher than this latest estimate, and we have held in this regard that where a low bid is as little as 7.2 percent greater than the government estimate, rejection of all bids is not an abuse of the contracting officer's discretion. Building Maintenance Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233. Accordingly, AAAI's argument that the government estimate demonstrates the reasonableness of its bid price is not persuasive.

protesting the proposed cancellation to this Office, there has been no showing that HHS acted in bad faith in originally issuing the set-aside, and the key fact remains that the firm was not unreasonably excluded from the procurement because a compelling reason exists to cancel the set-aside procurement, a risk always taken by those who choose to bid on government contracts. Therefore, these costs are not recoverable. See Computer Resource Technology Corp., B-218292.2, July 2, 1985, 85-2 CPD ¶ 14.

The protest, with its alternative claim for costs, is denied.

for *Seymour Efron*
Harry R. VanCleve
General Counsel